IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 512 OF 2000

Jaywant Pandurang Survey @ Sanjay
@ Jaywant Baburao Jadhav,C-11371
Yervada Central Prison, Pune. ..Appellant
(Orig.Accused)

Vs.

The State of Maharashtra. ..Respondent.

Miss D.M. Shah, Advocate appointed for appellant.

Mrs. U.V. Kegriwal,A.P.P. for STate.

CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.

DATE : 10TH SEPTEMBER, 2004.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.).

. This appeal against the conviction, by the judgment dated 24th April, 2004, passed by the Additional Sessions Judge, Brihanmumbai, whereby, the appellant/accused has been convicted under section 302 and sentenced to life imprisonment.

2. The learned Sessions Judge held that on the night of 29/10/1997 at about 10.30 p.m. there arose quarrel between the accused and deceased Janabai in connection with the missing earing and in the hit of

anger he poured kerosene on the person of Janabai from the plastic can lying in the hut and put the said Janabai on fire by the burning glass lamp. Consequently, Janabai sustained fire and shouted loudly. The accused also started shouting. The accused tried to save her by taking Janabai to the hospital. He shouted for help saying "Mazi Bayko Jalali, Mazi Bayko Jalali" One Dashrath Naikam P.W.2 rushed to the spot, he saw Janabai with burn injuries on her person, lying on the ground and accused was standing there. P.W. 2 went to bring taxi at the request of accused. However, before P.W.1 reached with the taxi, accused took another taxi and taken victim Janabi to KEM hospital at Parel. The duty constable P.W. 6; completed all formalities, taken the entry in the E.P. register, informed to R.A. Kidwai Marg Police Station, also to Kurla Railway Police Station and brought Janabai to the hospital. One Dr. Smt. Kanti Shetty took the history from the patient Janabai herself on 30/10/1997 at about 12.45 a.m. As per the said note the said alleged homicidal burns caused by the accused-husband at around 10.30 p.m. on 29/10/1997, by pouring kerosene over her and set her on fire at Sewree, at her house. The Police Officer from Kurla Railway Police Station, P.S.I. Surve (P.W.7)

while the deceased was under treatment, visited the hospital and met the deceased Janabai, after ascertaining fitness and consciousness of the patient Janabai at the relevant time, with the help of Medical Officer Smt. Kanti Shetty recorded the statement of victim Janabai. In her second statement, she again disclosed that since about one and half year prior to the date of incident she was residing with her husband Jaywant- accused. It was specifically disclosed that she was treating Jaywant as her husband. In the said statement, she specifically disclosed that her husband Jaywant poured kerosene on her person and set her on fire with burning lamp. He further disclosed that accused Jaywant brought her to the KEM hospital by taxi and got her admitted in the hospital. She also disclosed that she had one male child from earlier husband. In view of this, the offence was registered under Section 307 of Indian Penal Code. Later on, the said victim Janabai who was taking treatment in the K.E.M. hospital, succumbed to injury and she died on 30/10/1997 at 8.05 hours. The crime therefore, converted into the Crime No. 479/1997 under Section 302 of Indian Penal Code.

3. After due inquiry and investigation the place of incident was visited by the police along with the panch witnesses and the panchanama of the place of incident vide Exh.7, was drawn on 30/10/1997. These panch witnesses are Anand Pandit Mhaske and Uttam Kundlik More. The inquest panchanama Exh.12 also drawn on 31/10/1997.The statements of the witnesses were recorded. The clothes, as well as, other articles from the place of incident were seized. The accused was arrested on 4/11/1997 and arrest panchanama Exh. 21 was prepared. The muddemal articles were sent to Chemical Analyser for analysis and those reports are Exhs.28 and 29.

4. The accused has denied the charges and therefore, trial commenced. Legal aid was provided to the accused as prayed. The prosecution to substantiate the charges against the appellant recorded evidence of the nine witnesses. No defence witness was examined.

5. We have re-weighed and re-appreciated the evidence and material placed on the record with the assistance of learned advocates, appearing for the parties. We are convinced with the reasons given in the

present case

6. The testimony of the witnesses basically P.W.5 Dr. Smt Kanti Shetty (Exh.13), as well as, medical case papers vide Exh.15 clearly demonstrate that the victim Janabai had succumbed to burn injuries on 30/10/1997. The incident took place on 29/10/1997 at night. The medical papers shows the treatment given to her by P.W.5. The evidence of the concerned officer, could not be brought on record.The evidence of P.W. 5 Dr. Smt. Kanti Shetty who treated the patient Janabai was also on duty at the relevant time. The prosecution has placed on record the reason for non examining Dr.Bhaskaran and Dr.Milind as they had left the job and their present addresses were not known. Dr. Milind has left India, as reported, vide Exh.23.

7. In the present case, there are two statements recorded of deceased Janabai, immediately, after the incident. The evidence of Police Constable on duty P.W.6, Baban N. Sangle, at Exh.16 who was on duty in the K.E.M. hospital at the relevant time, has corroborated further the statement recorded on 30/10/1997, by P.W.7, P.S.I. Survey, in the presence of

P.W.5 Dr. Smt. Kanti Shetty. This also proved that at the time of second statement, the deceased was in a stable condition to make statement. She was conscious and fit to make any statement as recorded and observed in the testimony of the witnesses. In the statement made to the P.S.I.(P.W.7), she again declared that the accused had poured kerosene on her person and set her on fire on 29/10/1997.

8. Another witness Dashrath Nikan after hearing the shouts reached near to the hut of the accused and found Janabai lying on the ground and accused was standing near her.

9. Both the witnesses basically Dr. Kanti Shetty, as well as, P.S.I. who recorded the statement when the said victim Janabai was alive and conscious. The said complaint also disclosed the endorsement of the Medical Officer, who was on duty at the relevant time and who have treated said patient at the initial stage. The said endorsement is at Exh.40 which is proved by Dr. Smt. Kanti Shetty in her evidence. There is no doubt that initially when statement Exh.19 was recorded it was just information or complaint recorded by the P.S.I.,

about the incident of burn of Janabai, after receipt of the information by the duty constable P.W.6 Sangle.

10. As Janabai succumbed to the injury at the hospital, her statement Exh.19 thereafter, was treated and styled as dying declaration, as per the provisions of Section 32 of Indian Evidence Act. So any way this cannot be said that the said statements, as it was not recorded by the Magistrate or any other independent person during the course of the investigation, was not a dying declaration as contemplated under the law. However, it is not that in such occasion or in any such cases or any such circumstances, the dying declaration must be the recorded by Magistrate and cannot be recorded by police officer.

11. There is no dispute that on this statement Exh.19, there is an endorsement put by the writer P.S.I. Surve, as both the hands of deceased were burnt and as there was a bandage, thumb impression could not be obtained. There is an endorsement of the Medical Officer Smt. Kanti Shetty on the said statement about the consciousness and fitness of Janabai to give statement. There is no total bar as laid down by Apex

Court, that under Section 32 of Evidence Act in case of murder or such other case dying declaration recorded before the police officer are inadmissible. As per Apex Court's decision a dying declaration can be relied for conviction even if, it is not recorded before Magistrate. The explanation and the endorsement read with the testimony given by these two witnesses according to us also in no way support the case of defence that as such statementw were not recorded before the Magistrate, cannot be treated as an dying declaration. In our view said statement Exh.19 is admissible and can be relied upon for conviction r/w with other circumstantial and connected and corroborated evidence.

12. One Dashrath saw the incident and burning injuries of the victim immediately after the incident. This also proves that the accused, as well as, the victim were residing in the said hut. Whether they were living as husband and wife as sought to be contended by the defence advocate, or whether there was no legal marital relation between the two in the present case makes no difference, in view of the fact that as prosecution able to establish that they were residing

together as husband and as victim herself made such statement twice. Any way, in view of the victim's statement this defence is not sufficient to discard the prosecution case, as proved and as observed by the learned Sessions Judge.

13. It is also brought on the record by the prosecution, through the mother, (P.W 8) of the deceased Janabai that Janabai was not willing to go back with the accused. The accused had insisted her and ultimately she left her house with the accused on the said evening. This evidence of Mother of Janabai read with P.W. Dashrath and P.W.6 police constable, Sangle, further establishes the prosecution case that the accused was the person who was residing with Janabai at the relevant time, as husband and he was the person who was present with her during the night of 29/10/1997. The witness, Dashrath, saw the victim in burning condition and the accused was standing there nearby. Merely because accused had brought victim to the hospital that by itself cannot be the reason to disbelieve the prosecution case.

14. The accused was arrested on 4/11/1997 as he was

absconding after admitting Janabai in the hospital on 29/10/1997, the accused appellant who got the victim admitted in the hospital styled himself as neighbour of Janabai, residing at Sewree and he had also given different name as Jaywant Baburao Jadhav but in fact the said person is Jaywant Pandurng Surve.

15. The action of the accused by pouring kerosene and then setting her on fire further disclosed his intention and his recklessness and full knowledge of the

consequences. The post-mortem report on the record shows that the victim had sustained 72% burn injuries. within short time, she was succumbed to injuries.

16. In view of the above findings, we are also of the view that prosecution has discharged the burden of proving the charge under section 302 against the accused. The evidence recorded and reasoning given by the Additional Sessions Judge, no where gives any mitigating circumstances to consider the case of this nature within four corners of the exceptions of section 302 of Indian Penal Code. This cannot be a case of

sudden annoyance or provocation and or result of quarrel between the two. According to us also the offence under section 302 of Indian Penal Code is proved against the accused beyond reasonable doubt. In the facts and circumstances of the case, therefore, merely because the appellant is a poor person and having three children including two married sisters depending upon him that itself cannot be the reason to show any leniency. Therefore, we maintain the order passed by the Court below in toto. There is no merit in the appeal.

17. In view of this, the appeal is dismissed and the conviction and order passed by the Court below is confirmed.

18. We quantify thefees to be paid to the Advocate appointed for the appellant and the learned A.P.P. at Rs. 1,500/- for this appeal.

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]